

DANARD HOUSE INFORMATION SERVICES DIVISION, LTD.
v.
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-125-A

Decided March 7, 1994

Appeal from the denial of an application for a U.S. Direct Loan.

Dismissed in part. Affirmed.

1. Indians: Financial Matters: Financial Assistance

Organizational costs cannot be used in calculating whether an applicant for a U.S. Direct Loan has met the 20 percent equity requirement of 25 CFR Part 101.

2. Indians: Financial Matters: Financial Assistance

Although regulations in 25 CFR Part 101, governing the U.S. Direct Loan Program, require that an economic enterprise be at least 51 percent Indian-owned in order to be eligible for a direct loan, they do not specifically require that the economic enterprise be Indian-controlled. The legislative history shows that Congress intended that the Indian ownership be substantially and actively involved in direction and management of the enterprise.

3. Indians: Financial Matters: Financial Assistance

Applicants for a U.S. Direct Loan must show that their proposed operations will contribute to the economy of an Indian reservation or the members thereon.

APPEARANCES: Sandra C. Loew, James D. Sheppard, and James G. Jordan, for appellant; William M. Wirtz, Esq., Office of the Solicitor, U.S. Department of the Interior, Sacramento, California, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Danard House Information Services Division, Ltd., seeks review of a June 30, 1993, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), denying an application for a U.S. Direct Loan. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision, while dismissing certain of appellant's arguments.

By letter dated February 2, 1993, appellant submitted a business plan to BIA in support of a request for a \$350,000 direct loan under Title I of the Indian Financing Act of 1974, 25 U.S.C. §§ 1461-1469 (1988). ^{1/} The cover letter states that Sandra Loew, "[t]he primary share holder (70%), and Vice President of the corporation is an American Indian which qualifies her for a loan from" BIA. The accompanying Certificate of Degree of Indian Blood from the Miami Agency, BIA, in Oklahoma, states that Loew "is of Indian blood and belongs to the Seneca-Cayuga Tribe."

As described in the business plan, appellant offers public access via an "800" telephone number to a computerized classified advertisement system, which is described as an alternative to newspapers, yellow pages, fliers, and other means of disseminating advertising information. The plan indicates that appellant has 8 full- and part-time employees, plus 35 sales representatives, and was at that time restricted to the Southern California regional market, but intended to expand nationwide. The Southern California market is described as having over four million potential users. Competitors are listed as television, radio, newspapers or printed fliers, and employment agencies. The plan states that these four competitors together control approximately 75 percent of the market, but estimates that appellant can capture 30 percent of the market within 4 years because of its lower prices, quick and flexible personal service, and greater geographical exposure. Competition from computer-access bulletin boards is also acknowledged, but the plan states that customers will prefer appellant's "personal touch," and the fact that it is not necessary to have a computer or to be computer-literate. The plan concludes that there appears to be a demand for appellant's service despite current economic conditions.

Appellant provided additional information on March 15, 1993. The application package as supplemented was reviewed in BIA's Washington, D.C., credit office. The reviewer recommended disapproval of the application. By letter dated March 31, 1993, the Area Director denied the application, finding that appellant had failed to meet the 20 percent equity requirement, the personal financial statements provided did not reflect any personal investment in the company, the income projections were unsubstantiated, and collateral was substantially below the loan balance. The Area Director informed appellant of its right to appeal this decision to the Board.

Appellant did not file an appeal, but instead, on April 28, 1993, submitted a revised application to BIA. This application was evaluated by a BIA contractor, the Council of Energy Resource Tribes - Technical Services Corporation (CERT-TSC; contractor), which had previously been granted a contract under P.L. 93-638 to audit BIA's administration of its Indian Financing Act programs.

^{1/} All further references to the United States Code are to the 1988 edition.

Based upon the recommendation of CERT-TSC, the Area Director again denied appellant's application. His June 30, 1993, denial letter states:

Our disapproval is based on the fact that the financial condition of the corporation after three months of operation resulted in approximate \$32,000 loss. The three year projections are extremely optimistic. Sales projected for year 1 are \$2.7 million with net income of \$398,830. To increase sales from \$4,700 in 1992 for a six month period to \$2.7 million the next year is impossible when considering the newness of this industry and technology, the competition from other advertising media, and the general economic condition of the country. The growth over succeeding years to achieve sales of \$141.9 million is propitious. This would be an increase of over 5000 percent in five years; there is no business that could achieve this growth in such a short period. The market information does not justify or document this level of activity. The information presented is based on population numbers and percent capture without considering the target markets which would be a lesser population from which to draw.

Your application does not meet equity requirements. The regulations require 20 percent equity by the applicant in a new or business expansion. The revised (unaudited) balance sheet reflects total capital of \$71,584. The assets of the business include furniture and fixtures, computer hardware, computer software and vehicles with book value after depreciation of \$67,308. Appraisals of these assets would result in a decrease in book value of 20 percent resulting in approximately \$54,000 of securable value if the software is included at cost. In accordance with 25 CFR Part 103, as amended, equity is defined as "the borrower's residual claim to business assets after deducting all business debt." In applying that definition to this application net securable assets of \$54,000 less accounts payable of \$4,994 results in \$49,006 in equity. Equity in the amount of \$49,000 does not represent the 20 percent equity requirement.

The corporation is not directed and managed by a qualified Indian. The President and Vice President are the senior officers of the corporation. The Indian applicant holds the position of Office Manager as depicted in the organizational hierarchy and is the Secretary of the corporation and major stockholder. The actual development and control of the company appears to be vested in the President as his resume states, "Directed the establishment of [appellant] from concept to implementation. This included the corporate structure, marketing strategy, capital, facilities, manpower and financial plans."

Appellant appealed this decision to the Board. Only appellant filed a brief .

Discussion and Conclusions

As a preliminary matter, the Board notes that appellant appears to believe that it is entitled to receive assistance under the Indian Financing Act programs. These are not entitlement programs. Rather they are programs governed both by statute and regulation and by BIA's exercise of sound and informed discretion. See, e.g., 25 U.S.C. § 1463, which makes loans dependent upon the "judgment" and "opinion" of the Secretary, who has delegated this authority to BIA. Cf. Fee v. Acting Anadarko Area Director, 24 IBIA 81, 82 (1993) (stating that the Indian Business Development Program is not an entitlement program). In order to receive a direct loan, an applicant bears the burden of, inter alia, proving that it has met all statutory and regulatory requirements, and providing a basis upon which BIA can conclude that there is reasonable assurance that the loan will be repaid.

Appellant objects to each of the Area Director's three reasons for denying its application. In regard to its financial projections, appellant contends that the Area Director improperly treated it as both a startup and an existing company. 2/

The Board has carefully reviewed appellant's applications and finds that, as far as the written record reveals, 3/ appellant must bear at least part of the responsibility for any confusion as to whether it was a start-up or an existing business. The first two sentences of appellant's February 2, 1993, letter applying for a loan state: "Let me introduce to you, DANARD HOUSE INFORMATION SERVICES DIVISION, LTD. This company has been in business for less than a year, but has been in the development stages for well over two years." (Emphasis in original.) The application and business plan generally speak in terms of an existing business which is seeking a loan with which to expand. For example, appellant states that it "is a service oriented business that provides public access to our computer classified advertisement system" (Business Plan section of application at 1); "began in 1991" (Ibid.); and "employs 8 full and part time employees as well as 35 sales representatives. We sell our products/services in the Southern California regional market" (Ibid.). Similar statements indicating that appellant is presently in business appear throughout the application, although some other statements could be read to suggest that the company is not fully operational.

However, for purposes of this discussion, the Board will assume that the Area Director treated appellant as both a start-up and an existing business. Appellant contends that this treatment violated 25 CFR 101.4(a).

2/ After reviewing 25 CFR Part 101, the Board concludes that start-up and existing businesses are essentially treated the same, with minor differences because of an existing business' past operational history.

3/ Appellant's written submissions would have been the information on which both reviewers based their recommendations and are the basis for the Board's review. Appellant asserts that it clearly stated that it was a start-up business in discussions with Sacramento Area Office personnel.

Section 101.4 states that "applications for loans to finance economic enterprises already in operation will be accompanied by: (a) A copy of operating statements, balance sheets and budgets for the prior two operating years or applicable period thereof preceding submittal of the application."

The Board fails to discern any way in which the Area Director violated a regulation which places a requirement on the applicant. It is possible that appellant is arguing that because its application did not include the information required from an existing business by section 101.4, the Area Director could not have concluded that it was an existing business. This still does not show a violation of the regulation by the Area Director.

Appellant also alleges that treatment as both a start-up and an existing business allowed the Area Director to convert its research and development costs into operating losses, thereby raising questions about its profitability.

When considering an application under which there are not sufficient assets to secure the requested loan, 4/ the Area Director must determine whether the application shows that expected income will be adequate to pay all expenses, including the loan principal and interest. This determination forms the basis for the decision on whether there is reasonable assurance that the loan will be repaid. 5/ The Area Director determined that appellant's projected income was unrealistic based on the conclusion that it had lost approximately \$32,000 in its first few months of operation. Although appellant asserts that the expenses which the Area Director considered to be operating losses were actually research and development costs, the income statement in the revised application shows only "income" and "operating expenses" with no indication that any or all of the operating expenses were for research and development.

However, giving appellant the benefit of every doubt, and assuming for the purposes of this discussion that it was a start-up business with prior research and development expenses which can and should be excluded from consideration, appellant then has no operational history. Beginning its operations the first year of the loan, appellant asks the Area Director to accept its revised projection of net sales of \$2,721,080 with net profits

4/ Appellant's revised application showed existing capital assets of \$69,880, with \$2,572 claimed in depreciation. It also showed that appellant intended to use \$210,000 from the direct loan to acquire additional capital assets (\$195,000 for computer hardware and \$15,000 for furniture and fixtures). Including both existing and new capital assets at their original or projected purchase price gives a total of \$279,880 in capital assets.

5/ 25 CFR 101.13(a) provides in pertinent part:

"United States direct loans shall be secured by such security as the Commissioner may require. A lack of security will not preclude the making of a loan if the proposed use of the funds is sound and the information in the application and supporting papers correctly show that expected income will be adequate to pay all expenses and the loan principal and interest payments, indicating reasonable assurance that the loan will be repaid."

of \$398,830 the first year; net sales of \$10,509,521 with net profits of \$2,968,614 the second year; net sales of \$25,031,363 with net profits of \$6,399,571 the third year; net sales of \$59,619,191 with net profits of \$16,063,705 the fourth year; and net sales of \$141,999,772 with net profits of \$52,728,266 the fifth year.

The Area Director is charged with the responsibility of determining whether there is a reasonable prospect that a loan will be repaid. 25 CFR 101.3(a) and 101.13(a); Nagel v. Acting Phoenix Area Director, 25 IBIA 174 (1994); Dayish v. Acting Navajo Area Director, 25 IBIA 159 (1994). Here he found that the market information appellant presented to justify its income projections was based solely on population figures without consideration of the likelihood of actual use. "The mere fact that people and businesses exist in an area does not mean that all of those people and businesses are potential customers for appellant." Dayish, 25 IBIA at 161. Appellant did not distinguish between those potential customers who would merely use its "800" access line and those who were likely actually to purchase advertisements. Its statement that it has designed its operations to appeal to everyone is merely its conclusion about its potential. Furthermore, the fact that appellant has received numerous inquiries about employment with it does not support any conclusion about potential sales. Although the Area Director perhaps made his point overly strong in stating that appellant's projections were "impossible" to achieve, 6/ the Board finds that it was reasonable for the Area Director to conclude that appellant had not substantiated its statements concerning its potential customers and its projected income. See Dayish, *supra*.

Appellant also appears to object to the Area Director's consideration of its competitors and economic conditions in evaluating its ability to meet its income projections, and argues that "[t]he Area Director's opinion that [appellant's] sales will not be as great as projected in the financial statements is not a basis for denial, pursuant to 25 CFR §101.13(a)." The portion of section 101.13(a) to which appellant apparently refers is quoted in footnote 5, *supra*. The remainder of that section relates to loans made by relending organizations and is not relevant to this case.

Appellant's reliance on section 101.13(a) is misplaced. The section provides that a loan may be made without security if the application correctly shows that there is a reasonable assurance that the loan can be repaid from expected income. The section does not prohibit the Area Director from questioning an applicant's projected income or from relying on his own expertise in deciding whether the projections are reliable and/or substantiated.

6/ Appellant has presented evidence of other companies which have experienced growth comparable to what it has projected. Even assuming that the Area Director erred by saying that such growth was "impossible," appellant has not shown a reasonable basis upon which the Area Director could conclude that similar growth was likely in appellant's case.

The Board concludes that it was well within the Area Director's discretion to determine that appellant had not presented evidence sufficient to give him a basis upon which to conclude that there was reasonable assurance the loan would be repaid. Accordingly, it affirms this ground for denial of appellant's application.

Appellant raises several arguments relating to the 20 percent equity requirement of 25 CER 101.3(a). This section provides in pertinent part that "the applicant will be required to have equity equal to 20 percent of the total cost of a new enterprise, or 20 percent of the total cost of expansion of an existing enterprise." "Equity" is defined in 25 CFR 101.1 to mean "the borrower's residual ownership, after deducting all business debt, of tangible business assets used in the business being financed, on which a lender can perfect a first lien position."

Appellant first contends that this regulation is arbitrary, capricious, inconsistent with the statute, and defines "equity" to mean "security." The Board lacks authority to declare a duly promulgated Departmental regulation invalid. Estate of Evan Gillette, Sr., 22 IBIA 133, 140 (1992); Wilson v. Acting Portland Area Director, 21 IBIA 188, 194 (1992), and cases cited therein. Accordingly, this aspect of appellant's appeal is dismissed for lack of jurisdiction.

Appellant contends that the equity requirement, and advice given by the Area Credit Officer concerning it, are inconsistent with a pamphlet entitled "Financial Assistance Programs," which was provided to it by BIA. To the extent that appellant claims rights emanating from allegedly erroneous advice given by the Credit Officer, it is well established that the Federal Government is not bound by erroneous or ultra vires actions or advice of its employees, and that such erroneous information does not grant rights not authorized by law. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947) ; D.G. & D. Logging Co. v. Billings Area Director, 20 IBIA 229, 235 (1991), and cases cited therein. Furthermore, to the extent there may be any inconsistencies between the regulations and the general informational pamphlet, the regulations control. Those who deal with the Federal Government are responsible for familiarizing themselves with duly promulgated regulations. Federal Crop Insurance Corp., *supra*; Blackhawk v. Billings Area Director, 24 IBIA 275, 280 (1993).

Appellant contends that the Area Director's failure to include organizational costs in the calculation of its equity contribution conflicts with 25 CFR 101.4, the rulings of other agencies, and public and private usage. Section 101.4 provides in pertinent part that "[a]n application from a corporation * * * must * * * include a copy of documents establishing the entity, or the proposed documents to be used in establishing it." As noted above, equity for purposes of participation in the direct loan program is defined in 25 CFR 101.1 and is based on "tangible business assets used in the business being financed."

[1] Section 101.4 does not require that a corporation actually be organized before it is eligible to file an application. Instead, it specifically authorizes the submission of proposed organizational documents

for a corporation not yet established. However, even if the section did require prior organization, the definition of equity in section 101.1 excludes this cost. The fact that equity and/or organizational costs may be treated or defined differently in other contexts is not relevant to a decision being made under specific regulations which define the term for the purposes of those regulations.

Appellant contends that the Area Director manipulated the equity requirement by incorrectly stating that its application was governed by 25 CER Part 103, and arbitrarily reducing the value of its assets by 20 percent. To the extent that the Area Director cited Part 103 in support of his decision, that citation was in error. However, the error is harmless under the circumstances of this case, because the same definition of equity is used in 25 CFR Part 101, which governs this case.

The Area Director found that appellant's revised and unaudited balance sheet reflected total capital of \$71,584, including tangible assets after depreciation totaling \$67,308. He reduced that amount by 20 percent, which he stated would be a reduction resulting from an appraisal, and then by \$4,994, the amount of accounts payable. The Area Director thus concluded that appellant had only \$49,000 in equity, which was less than the \$70,000 which represented 20 percent of the amount of the requested loan. Z/

Giving appellant the benefit of any doubt and assuming that it reported its assets at precisely the amount at which they would have been valued by an independent appraiser, appellant still has not shown that it has met the 20 percent equity requirement. Appellant does not dispute the figures used by the Area Director. Its revised application shows \$69,880 as capital assets acquired, 8/ \$9,164 in organization expenses, \$39,799 in operating expenses, 9/ \$2,572 in depreciation, \$4,944 in accounts payable, and a bank balance of \$56. Neither organization nor operating expenses count toward equity. See 25 CER 101.1. Neither are they depreciable. Accordingly, all of the depreciation should be applied against the capital assets, leaving a

Z/ For purposes of this discussion, the Board assumes that appellant is a start-up business and that the requested loan amount, \$350,000, is the total cost of the new enterprise. 25 CFR 101.3(a). Although appellant asserts that the total cost of its project is not \$350,000, it does not provide any other figure. The total cost can be no less than \$350,000 because that is the amount appellant has requested, and because its revised application shows total use of that amount. If the total cost of the project exceeds \$350,000, appellant's 20 percent equity requirement would only be increased.

8/ This represents an increase from the \$54,880 in capital assets shown in appellant's original application. Although the revised application does not show the type of capital assets, the Board assumes they are the same as those shown in the original application; i.e., furniture and fixtures, computer hardware, and computer software.

9/ For purposes of this discussion, it is not relevant whether these are operating or research and development expenses because neither of these expenses would count toward equity under the definition in 25 CFR 101.1.

value of \$67,308. Even assuming that appellant had taken accelerated depreciation on its capital assets for tax purposes, and that the assets could have been resold for their full purchase price, the assets could, at most, be valued at \$69,880. ^{10/} Accounts payable are properly deducted from appellant's cash resources of \$56 and the value of capital assets. Subtracting \$56 from \$4,944 leaves \$4,888 to be deducted from capital assets for accounts payable. Subtracting \$4,888 from \$69,880 leaves equity of \$64,992; while subtracting from \$67,308 leaves equity of \$62,420. Neither of these figures is equal to or greater than \$70,000. Therefore, after giving it the benefit of every doubt, appellant still has not shown that it met the 20 percent equity requirement, or that the Area Director manipulated the requirement to its detriment. The Board affirms the Area Director's conclusion that appellant failed to meet the 20 percent equity requirement.

Appellant contends that the Area Director misrepresented Loew's position within the corporation. It states that Loew

is the majority stockholder, sets [sic] on the Board as Secretary, is in charge of all operations including; sales, employees, financial reporting, costs disbursements, payroll, etc. As an employee of the corporation Mrs. Loew is on equal standing with Mr. Jordan, Mr. Soto (sic; probably should be Goto] and Mr. Ashley all of whom report to Mr. Sheppard, who Mrs. Loew as the majority stockholder and in her capacity of complete control appointed to be President. * * * What is required is active management and Mrs. Loew's participation in the company goes far beyond this requirement.

(Opening Brief at ¶ 60). Appellant also objects to the Area Director's reliance on a statement in the resume of James Jordan, appellant's Vice-President for Sales and Marketing (erroneously attributed to the resume of James Sheppard, the President), to the effect that Jordan had "[d]irected the establishment of [appellant] from concept to implementation. This included: the corporate structure, marketing strategy, capital, facilities, manpower and financial plans."

The Board sympathizes with the Area Director's questions about Loew's position in the corporation. The February 2, 1993, letter transmitting the initial application states that Loew is Vice-President of the corporation. The organizational documents state that she is Secretary and owner of 70 percent of the corporate stock. The organizational chart shows her to be in charge of the Clerical branch with the title of Office Manager, while showing Jordan to be Vice-President for Sales and Marketing, Goto to be Vice-President for Research and Development, and Ashley to be the CEO. Furthermore, it is reasonable to question whether an individual who had developed the entire concept for this corporation was actually willing to turn control and direction of it over to others once his concept was apparently becoming reality.

^{10/} Although appellant asserts that an appraisal could result in an increase in valuation, it has presented no basis for a conclusion that depreciable assets used in a business will increase in value over their initial purchase price.

[2] The Board has previously discussed the requirement for Indian control of a business in the context of the guaranteed loan program. In Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, 22 IBIA 153 (1992), the Board concluded that there was no requirement under 25 CFR Part 103 that an enterprise be Indian-controlled in order to receive a loan guaranty. Such a requirement does exist under the Indian Business Development Program in 25 CFR 286.3. As with Part 103, the Board finds no requirement in Part 101 that a corporation must be Indian-controlled in order to be eligible for a direct loan. The regulations require only that the enterprise be an “Indian-owned commercial, industrial, agricultural, or business activity established or organized for the purpose of profit, provided that eligible Indian ownership constitutes not less than 51 percent of the enterprise.” 25 CFR 101.1. The legislative history of 25 U.S.C. § 1452(e), which establishes the 51 percent Indian ownership requirement, states that Congress “intend[ed] that such Indian ownership be substantial and active in the management of the enterprise and not a ‘strawman’ ownership with active control of the enterprise in the minority, non-Indian ownership.” H.R. Rep. No. 93-907, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 2873, 2876.

Loew owns 70 percent of appellant's stock. The revised application, however, raises questions concerning Loew's actual position in the corporation and the identity of the person directing it. It was appellant's responsibility to show that Loew had a substantial and active management role. Appellants' conclusory statements on appeal that “Loew's participation in the company goes far beyond this requirement” and that “as an employee * * * [she] is on equal standing” (Opening Brief at ¶ 60), do not carry its burden of proving the error in the Area Director's decision. Jerome v. Acting Aberdeen Area Director, 23 IBIA 137, 140 (1993). ^{11/} Accordingly, the Area Director's conclusion that appellant was not eligible for a direct loan because there was not sufficient direction and management by the Indian ownership is affirmed.

[3] Although the Board does not normally add to an Area Director's decision, it does so here because of the clear nature of appellant's failure to meet the requirements of 25 CFR 101.2, which provides in pertinent part:

Loans from the Indian Revolving Loan Fund shall be made for purposes which will improve and promote the economic development on Indian reservations.

* * * * *

(b) Direct loans from the United States shall be made for the following purposes:

(1) To eligible * * * corporations * * * to finance economic enterprises operated for profit, the operation of which

^{11/} Elsewhere appellant argued that a title does not always reflect the actual authority held by an individual. If this were the case here, it was appellant's responsibility clearly to show Loew's actual authority. Appellant has not done so.

will contribute to the improvement of the economy of a reservation and/or the members thereon.

The Board has been able to discover only one reference to appellant's potential economic contributions to any Indian other than Loew. Appellant's February 2, 1993, letter states: "In the city of Riverdale, California, is a large school solely for the education of Indian Children. The name of this school is Sherman Indian High School. [Appellant] intends to recruit both full and part time employees from this school for training in technical, sales and management positions."

Appellant has cited no reservation in Southern California to whose economy its operations will contribute. Furthermore, the reference to possible recruitment of students from Sherman Indian High School does not show economic benefit to the economy of a reservation. The Board has been informed by BIA's Office of Indian Education in Washington, D.C., that the Sherman Indian High School is not located on a reservation. Even assuming that students were actually recruited from Sherman Indian High School, and that all recruited students lived on the same reservation, appellant has not shown that its planned operations would have anything more than a minimal impact on the economy of some unidentified reservation. See Nagel, supra; Navajo Precision Built Systems, Inc., supra. Appellant's application could, and should, have been denied for this additional reason.

Appellant raises several arguments which are treated summarily. It contends that the Area Director and/or the Credit Officer did not properly perform their duties as set forth in their position descriptions. Included are allegations that either or both officials failed to provide appellant with the names of banks participating in the BIA credit programs; misrepresented the need for 20 percent equity; provided incomplete and/or erroneous information at a meeting following the first denial of appellant's application; and manipulated the equity requirement.

The Board is not a court of general jurisdiction. It has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to review the performance of BIA officials except as that performance may be reflected in appealable decisions. See 43 CFR 4.1(b)(2). To the extent appellant seeks review of whether the Area Director and/or the Credit Officer properly performed their job responsibilities as set forth in their position descriptions, the appeal is dismissed for lack of jurisdiction. To the extent, however, that appellant raises specific issues relating to the Area Director's decision, those issues are addressed in this opinion.

Appellant objects to an implied ground for denial which it reads into the Area Director's March 31, 1993, decision, and to the fact that that decision placed no equity value on computer software. The March 31 decision is not at issue in this appeal, having been superseded by the June 30, 1993, decision. The Board does not consider any arguments related solely to the March 31 decision.

Appellant contends that although the Credit Officer was openly hostile to it and admitted that she did not have the experience necessary to

evaluate an application from a computer company, the Area Director accepted and approved two denials from her. The administrative record does not support appellant's statement that the denials were based on the recommendations of the Credit Officer. Although appellant states that the Credit Officer informed it that she intended to deny or recommend denial of its initial application, that application was ultimately reviewed by an official in BIA's Washington, D.C., office, and the revised application was reviewed by an outside contractor. Both denials were based upon statements made in the recommendations. The Board finds no basis upon which to conclude that the denials were based on recommendations made by the Credit Officer. In fact, it appears likely that the applications were reviewed outside the Sacramento Area precisely because of the problems appellant cites.

Appellant asserts that the Area Director acted improperly by having its revised application reviewed by an outside contractor rather than by the Muskogee Area Office, which the Chairman of Loew's tribe had contacted on her behalf. As far as the record reflects, the decision to send the application to an outside contractor was made in the Washington, D.C., Central BIA Office, which has overall management responsibility for BIA programs. The decision to use an outside contractor was based upon the desire to have appellant's application reviewed by an uninvolved person. 12/ Appellant's contention that a "contractor" merely does what the person contracting tells it to do, shows that appellant does not understand the P.L. 93-638 contracting process. Nothing in the record supports any conclusion other than that the contractor independently and objectively evaluated appellant's application. However, the choice of whether to use inhouse personnel or outside contractors to accomplish the work assigned to BIA is not a matter over which the Board has review authority. Accordingly, this aspect of the appeal is also dismissed for lack of jurisdiction. 13/

Appellant contends that the Area Director's withholding of the contractor's actual recommendation document on grounds of "executive privilege" when it was requested under the Freedom of Information Act (FOIA) was improper because the Area Director relied on that document in reaching his decision. 14/

12/ Because appellant's original application had been reviewed in the Washington, D.C., office, the impartiality of that office might also be questioned.

13/ Appellant states at page 8 of an undated letter to Congressman Ken Calvert, which was forwarded to the Area Director on July 21, 1993, that one BIA Area Office told it that its application would already have been approved had it been submitted to that office rather than to the Sacramento Area Office. Because of its findings relative to the problems with appellant's application, the Board doubts that such a statement was made with full knowledge of the application.

14/ The document was not withheld on grounds of "executive privilege," which is Exemption 1 under the FOIA, 5 U.S.C. § 552(b)(1). Rather, the document was withheld under Exemption 5, which addresses "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

The Board finds this issue moot. Prior to appellant's FOIA request to the Area Director, it asked the Board for copies of several documents in the administrative record, including Tab D, the contractor's recommendation. In the absence of any indication from the Area Director under 43 CFR 4.31 that he was claiming an FOIA exemption for this or any other document in the administrative record, a copy of it was sent to appellant. Appellant's opening brief shows that it had this document and based arguments on its contents.

Appellant asks that the Board find that the Area Director "acted with lack of due discretion, collusion, malice, intentional wrong doing, bad faith and in a false, capricious, arbitrary and unreasonable manner; in violation of the Indian Financing Act of 1974, 25 CFR §§ 101, 103" (Opening Brief at ¶ A). For the reasons discussed above, the Board cannot make this finding.

Appellant contends that it has been injured "in the amount of at least ten million dollars" (Opening Brief at ¶ C), for which alleged injury it asks treble damages. The Board lacks authority to award money damages against BIA. Welmas v. Sacramento Area Director, 24 IBIA 264, 273 n.6 (1993), and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 30, 1993, decision of the Sacramento Area Director is affirmed. 15/ The appeal from that decision is dismissed as to those arguments noted supra. 16/

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

15/ The Board has upheld the Area Director's denial on four separate grounds. Any one of these grounds, standing alone, would have been sufficient to justify the denial.

16/ Any additional arguments raised by appellant which were not specifically discussed were considered and rejected.